

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1488

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1488

ANTHONY BARATTA,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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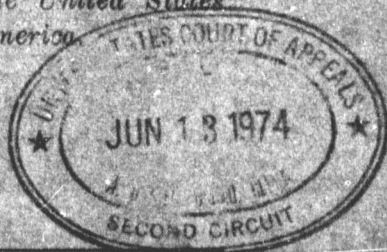


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Preliminary Statement

Anthony Baratta appeals from an order filed February 28, 1974, in the United States District Court for the Southern District of New York by the Honorable Irving Ben Cooper, United States District Judge, denying without a hearing Baratta's motion under Section 2255 of Title 28, United States Code, to vacate a judgment of conviction entered on August 22, 1967.

Indictment 64 Cr. 1148, filed on December 31, 1964, charged Baratta and five co-defendants in two counts with conspiracy to violate the Federal Narcotic Laws and with the sale of 237 grams of heroin in violation of Title 21, United States Code, Sections 173 and 174. On July 20, 1967, after a four day trial before Judge Cooper and a jury, Baratta and three co-defendants were found guilty as charged.

On August 22, 1967, Baratta was sentenced to five years on Count One and ten years on Count Two, the sentences to run consecutively.

Petitioner's conviction was affirmed on direct appeal on June 21, 1968, *United States v. Baratta*, 397 F.2d 215 (2d Cir.), and *certiorari* was denied by the Supreme Court on November 12, 1968, *Baratta v. United States*, 393 U.S. 939 (1968). Thereafter on May 14, 1969, defendant's motion for reduction of sentence made pursuant to Rule 35 of the Federal Rule of Criminal Procedure was denied.

On September 17, 1973, the District Court's denial without a hearing of petitioner's earlier motion pursuant to Title 28, Section 2255, to vacate the judgment of conviction was affirmed on appeal by this Court. Docket No. 73-1724.

Statement of Facts

A. The Government's Case

For several months New York City Police Detective George Bermudez, assigned to the Narcotics Squad and working undercover, had negotiated at various bars in Manhattan and the Bronx with Ralph Ciccone, Samuel Monastersky, and Anthony Verzino for the purchase of heroin. In July, 1963, he was able to make a tentative agreement with Verzino to buy a quarter kilo of heroin for \$3,400, but, although Bermudez had previously purchased heroin from Ciccone, Verzino's associate, Verzino was still distrustful of him and hesitant to commit himself to a definite delivery date until he could check out Bermudez (19).*

* Numbers in parenthesis refer to the stenographic transcript of the trial.

Finally, on September 21, 1963, at about 2 A.M. Bermudez phoned Monastersky's place of employment, a bar known as the 292 Club, located at 292 East 149th Street, Bronx, New York, to ask whether anything had been decided concerning the prospective sale. In response to Monastersky's invitation to "come on over," Bermudez arrived at the 292 Club 15 minutes later (23). Monastersky greeted him with the news that he could have "some very good top goods right now" (25). When Bermudez asked about the price Monastersky motioned to one of the bar patrons, later identified as Rocco Sancinella, to join them. After a brief introduction Sancinella quoted a price of \$4,000 for a quarter kilo. Bermudez objected and reminded Monastersky that they had already agreed upon a price of \$3,400. Upon hearing Bermudez' complaint, Sancinella went to the far end of the bar and had a short conversation with Verzino, who then called Bermudez over and informed him that the lowest possible selling price for the heroin was \$3,900 (27-28).

After an unsuccessful attempt by Bermudez to reduce the price further, it was agreed that the sale would take place within the next few days. Verzino told Bermudez that when everything was ready he should park his car some 15 blocks away from the 292 Club with the \$3,900 in the trunk and then proceed by taxi to the Club, where he would give his car keys to Verzino (30).

During a visit to the Club several days later, Bermudez was informed by Verzino that the sale would take place on the evening of September 24, 1967. Accordingly, on that night Bermudez parked his car at East 143rd Street in the Bronx and took a cab to Courtland Avenue and 149th Street. While walking from there towards the 292 Club he met Verzino, who had just finished a brief curbside conversation with Baratta, after which Baratta had gotten into a black Cadillac and driven off (35). On

their way to the club Verzino rebuked Bermudez for being late, adding that had he arrived one-half hour earlier at 8 P.M. he could have received the heroin immediately; now however, they would have to wait until 10:00 P.M. Bermudez apologized for being late and confessed that, contrary to Verzino's instructions, he had brought the \$3,900 with him because he thought it risky to leave the money in the trunk of his car. Verzino answered, "All right" and suggested they might as well go to the kitchen in the Club and count the money. There they met Monastersky and Sancinella, who helped count the \$3,900. Bermudez and Verzino then returned to the bar to await the delivery of the heroin (35-37).

At about 9:50 P.M. Verzino glancing towards the Club entrance, saw America Vega enter, and said, "Here she is now." Approaching him she asked, "Excuse me Tony, can I see you a minute." Taking her aside, Verzino spoke to her briefly and then returned to Bermudez to ask for his car keys. Bermudez handed Verzino the keys together with a piece of paper describing his car, a green Rambler, and its location. Verzino then gave the keys and the paper to Vega, who put them in her pocket and left the bar (43-46).

A few minutes later Baratta entered the 292 Club and walked towards Verzino, who whispered to Bermudez, "Here's my delivery man now" (41). Leaving Bermudez seated at the bar, Verzino intercepted Baratta and pulled him aside. After a brief conversation they left the Club together and walked east on 149th Street towards Cortland Avenue. Bermudez followed a short distance behind and saw them turn the corner of Cortland and 149th Street, where Verzino stood near a black Cadillac still speaking to Baratta, who was now seated inside the car (488-489). Bermudez turned back and while walking towards the Club was overtaken by Verzino who said, "It won't be long now" (51-53).

Meanwhile Baratta drove to East 148th Street, near Willis Avenue, and, after parking the black Cadillac, walked over to a 1963 Oldsmobile and took a seat alongside its male occupant. About one minute later Baratta emerged from the Oldsmobile with a package in his hand and a raincoat draped over his arm (490-491).^{*} Accompanied by the other man, Baratta got back into the Cadillac and drove off. Baratta was next observed at about 10:30 P.M. parking the Cadillac behind Bermudez' Rambler. Leaving his passenger in the Cadillac, Baratta walked to the front of the Rambler and after attempting unsuccessfully to open each of the front doors of the Rambler, returned to his companion in the Cadillac and proceeded to cruise slowly around the neighborhood (318-320).

Meanwhile back at the 292 Club, Bermudez saw that it was 11:30 P.M. and grew impatient. He complained about the delay to Monastersky and Sancinella, both of whom assured him that the deal was near a successful completion (54).

Some 15 minutes later, close to midnight, Vega again entered the Club and walked over to the bar where Bermudez and Verzino were seated. Verzino complained agitatedly that the deal was taking too long and demanded to know, "Where is he now? He's not here yet" (56-57).

Baratta entered the bar again at 1:45 A.M. Verzino hurried over to him and began yelling and cursing. They left the Club, and Bermudez followed. Outside, as Bermudez approached them, Verzino saw him and turning to Baratta said, "He's been waiting since 8:30." Addressing Bermudez,

^{*} Later, at about 1:15 A.M., two men returned to the Oldsmobile, drove repeatedly past the 292 Club, and then proceeded to Riverdale, where one of them entered an apartment house at 435 West 238th Street, for a few minutes (564-566). Baratta testified on cross-examination that he lived at that address.

Baratta said, "I'm sorry. it's my fault. I was held up" (59). Bermudez was then told by Verzino to return to the Club. Moments later his car keys were returned to him inside the club by Verzino, who informed him that the transaction would now be consummated at the bar. Asking Bermudez for the money, Verzino again counted the \$3,900 and then left the Club (60).

Verzino walked west to the corner of Morris Avenue and East 149th Street, stopped, looked around, and then continued toward Park Avenue. At the parking lot of a gasoline service station between Park and Morris Avenues, Baratta and Verzino, walking from opposite directions, met, and after a movement of hands between them, separated almost immediately. They each then turned around and walked in the direction from which they had come, Baratta toward the Grand Concourse and Verzino toward the 292 Club (321-322).

Five minutes after he had left, Verzino returned to Bermudez at the bar and quickly placed a brown package containing the heroin inside Bermudez' jacket, from which he simultaneously took the \$3,900.

B. The Defense Case

Appellant Baratta testified in his own behalf. He said he knew Verzino and happened to meet him one day in the street. He testified that he asked to borrow money from Verzino because he was about to be evicted from his home. Verzino allegedly told him to come to the 292 Club the next week, which he did, but he was then told to come back later. Embarrassed by his lack of funds, Baratta claimed he asked Verzino for carfare. Verzino permitted Baratta to use his car, a 1962 black Cadillac convertible, and they walked to the car together. Baratta returned to the Club at around 1:00 A.M., but again Verzino said to return the next day for the money. Harsh words were ex-

changed, after which Baratta walked out of the Club and hailed a cab. He testified that he had travelled about a block when he realized that he still had Verzino's car keys. He accordingly got out of the cab and started back toward the 292 Club. Verzino was walking toward him, and when they met Baratta handed Verzino the keys. He asked Verzino for five dollars, having spent his last dollar on the cab (643-650, 671-672).

On cross-examination Baratta denied having driven to Bermudez' Rambler or having tried to open its doors. Instead he claimed he had driven straight home in the Cadillac. Moreover, despite his claim of indigency and unemployment, Baratta was unable to account for all of the incriminating indicia of a lavish existence at the time of his arrest. These included a newly ordered 18 foot Chris-Craft boat and \$5,260 in cash found in one of his two cars. He also did not recall for how much rent or for how long he rented a vacation lakeside home he was living in at the time of his arrest during the summer of 1964. He claimed he was supported by his family and the income derived from his wife's occasional employment at a salary of \$85 per week. He denied living under the name of Philip Barone but was unable to explain documents indicating purchases of a boat and a Buick under that name. Nor was he able to explain a baptismal certificate, auto registration, driver's license and a check book in the name of Philip Barone. He claimed that they were not in his home when he was arrested (671-689).

C. Government's Rebuttal Case

In rebuttal the Government called David W. Martowski, one of the officers who arrested Baratta. At the arrest on July 11, 1964, Martowski testified he seized the documents which had been shown to Baratta on cross-examination, as well as \$5,260 in cash, which he found in the Thunderbird. At that time Baratta claimed that the money and a Thunderbird were his and admitted using the name Barone (694-698, 708-725).

ARGUMENT

The Petition Was Properly Denied.

In his petition below and on appeal, Baratta argues that his conviction should be set aside because his possession of the heroin was insufficient to permit the jury to apply the statutory presumption of knowledge of importation from possession, as Section 174 of Title 21 permitted, and because of the trial judge's failure to charge knowledge of importation as an element of the crime on the conspiracy count.

The short answer to Baratta's claims is that they were both raised by him on direct appeal (Baratta's Brief in Dkt. No. 31744 at 72-75, 84) and rejected by this Court. *United States v. Baratta, supra*, 397 F.2d at 225-227.* Since both claims were determined adversely to Baratta on direct appeal, he cannot, under the circumstances presented here, relitigate them anew on collateral attack. *Meyers v. United States*, 446 F.2d 37, 38 (2d Cir. 1971); *Sunal v. Large*, 332 U.S. 174 (1946).

Furthermore, Baratta's present arguments do nothing to suggest that this Court's determination on his direct appeal should be altered.

Baratta's first claim—that his possession of the heroin was insufficient to permit the application of the statutory presumption of knowledge of importation—relies on *United States v. Jones*, 308 F.2d 26 (2d Cir. 1962), *Hernandez v. United States*, 300 F.2d 114 (9th Cir. 1962), and *Jefferson*

* Baratta seems to suggest in his brief that the Court refused to consider as to him the error in the charge to the jury on the conspiracy count because his counsel did not object on that ground. The Court's opinion makes quite clear that it considered Baratta's claim on the merits despite the failure of his attorney to object. *United States v. Baratta, supra*, 397 F.2d at 225 n. 5.

v. *United States*, 340 F.2d 193 (9th Cir. 1965). Those cases are wholly inapposite, for they hold that, *in the absence of evidence indicating actual possession*, an accused must be shown to have been in constructive possession of the contraband before he could be charged with knowledge of its importation under the statutory inference contained in 21 U.S.C. § 174. The evidence against Baratta, however, clearly established that consistent with his function as a delivery man he had actual, not constructive, possession of the heroin sold. Based on Baratta's actual possession, regardless of the significance of his role in the overall transaction, the jury was justified in applying the statutory inference. It was Baratta who was identified as the delivery man by his co-conspirator and who apologized to Detective Bermudez for the delay in the scheduled heroin delivery by saying, "I'm sorry it's my fault. I was held up." And it was Baratta who transferred the heroin to Verzino in the parking lot of the service station immediately prior to its receipt by Bermudez.

Baratta's argument in support of his second claim—that his conviction for conspiracy should be reversed because of the trial judge's failure to charge knowledge of importation as an element of the offense—is pitched entirely on the Ninth Circuit's decision in *United States v. Bagby*, 451 F.2d 920 (1971). In that case, there were a number of defects in the trial court's charge, among them an instruction that possession by any co-conspirator warranted application of the statutory inference to all co-conspirators, which were significantly more prejudicial than the one of which Baratta complains, particularly since, as this Court noted on Baratta's direct appeal, the charge on the substantive count in this case included a proper instruction on the element of knowledge of importation, and Baratta was convicted on the substantive count. *United States v. Baratta*, *supra*, 397 F.2d at 225-226.

CONCLUSION

The order below should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York }
County of New York }

Miguel Segura being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *12* day of *June* *1974*
he served a copy of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

Anthony Baratta
Pembroke Station
Danbury, Conn

06810

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Sworn to before me this

13 day of *June*, *1974*